



Proposed Regulation Agency Background Document

Agency name	State Board of Social Services
Virginia Administrative Code (VAC) citation	22 VAC 40-25
Regulation title	Auxiliary Grants Program
Action title	Amend Auxiliary Grant Regulations
Date this document prepared	April 15, 2009

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

Proposed changes to the regulation include (1) removing the requirement that assisted living facilities (ALFs) accepting individuals with an Auxiliary Grant (AG) submit an annual audit report to the Department of Social Services (DSS) and replacing it with a requirement for an annual AG certification; (2) the addition of a Virginia residency requirement for AG eligibility; (3) clarifications regarding ALFs' participation in the AG Program and the submission of the provider agreement; (4) amendments to the assessment process for emergency ALF placements; (5) clarification for ALF providers regarding procedures surrounding resident discharges from facilities; and (6) use of person-centered language throughout the proposed text.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The legal basis for this regulation is §§ 63.2-217 and 63.2-800 of the Code of Virginia. These sections provide general authority for the development of regulations for program operation and mandatory authority for the development of regulations for the AG Program.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

Amending this regulation will enhance the health, safety, and welfare of vulnerable adults age 60 and over and individuals age 18 to 59 who have a disability and reside in ALFs throughout Virginia. The annual certification will provide sufficient assurances that the personal funds of individuals residing in an ALF are maintained appropriately and not commingled with facility funds. Implementing use of an annual certification form instead of the costly and complicated annual audit requirement in the current regulation will reduce burdensome reporting requirements that may hinder providers' willingness to continue to accept individuals who receive AG.

Establishing a residency requirement will ensure that more AG beds are available to low-income Virginia residents in need of ALF placements and reduce the number of out-of-state residents who relocate to Virginia in order to take advantage of the AG Program.

Clarifying assessment procedures for emergency admissions to ALFs and the ALF providers' responsibilities associated with discharging residents will improve communication between local departments of social services (LDSS) and ALF providers regarding individuals who are receiving AG payments. These clarifications will also ensure conformity with current licensing regulations.

Amending this regulation will have no impact on environmental issues.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

The proposed regulation amends the ALFs' financial reporting standards, adds AG residency requirements, clarifies assessment and discharge requirements, changes language to ensure that the AG regulation comports with licensing regulations, clarifies conditions of ALFs' participation in the AG Program, and promotes person-centered language when referring to individuals who apply for AG or live in ALFs. Substantive provisions include:

1. Changing annual audit report requirements to an annual certification requirement thereby minimizing the administrative burden while still ensuring ALFs appropriately manage the funds of the residents.
2. Adding a 90-day residency requirement for AG eligibility to ensure AG funds are available for Virginia residents.
3. Clarifying the assessment requirements associated with emergency placements in order to comport with licensing regulations.
4. Clarifying conditions of ALF providers' participation in the AG Program, including maintenance of residents' personal needs allowances in a separate bank account and issuance of monthly account statements.

- 5. Introducing person-centered language by removing references to applicant, recipient and resident.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

1. ALF providers in the Commonwealth have expressed concerns that the annual audit requirements in the current regulation were costly, complicated, and burdensome, and that without changes to this requirement, some providers may withdraw from the AG program, thus reducing the number of available AG beds. Replacing the annual audit requirement with an annual certification requirement will provide sufficient information to assure that personal funds of individuals residing in ALFs are properly maintained and not commingled with facility funds.

Creating a residency requirement will ensure that AG beds are available to low-income Virginia residents in need of ALF placements and reduce the number of out-of-state residents who relocate to Virginia in order to take advantage of the AG Program. AG Program payments are comprised of 80% state and 20% local funds. Implementation of a residency requirement may mean that localities supporting a large number of out-of-state individuals with AG would see a reduction in their large local match requirements. However some ALF providers with a majority of AG residents from out-of-state may express concern about the limitations imposed by an AG residency requirement.

2. Clarifying the current regulation regarding conditions of ALF providers’ participation in the AG Program, particularly with regard to admissions and discharges, will improve communication between LDSS and providers, reduce possible errors in AG payments, and remove current disparities between the AG regulation and department licensing regulations.

3. Use of person-centered language in the regulation promotes personal dignity by recognizing that everyone is unique and removes labels that categorize (and sometimes stigmatize) individuals who use state services and benefits.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

Changes to the regulation do not exceed applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

Due to a large number of non-Virginia residents seeking ALF placement in Southwest (SW) Virginia, localities in this region support more out-of-state individuals with local match funds than localities in other parts of the state. Implementation of an AG residency requirement may reduce the disproportionate funding burden borne by some SW Virginia localities.

ALF providers in the SW region may see a decrease in the number of applications to their facilities from individuals who qualify for AG payments.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

DSS is seeking comments on the intended regulatory action, including but not limited to (1) ideas to assist in the development of the proposed regulatory language, (2) the cost and benefits of the alternatives stated in this background document or other alternatives, and (3) potential impacts of the regulation. DSS is also seeking information on impacts on small businesses as defined in § 2.2-4007.1. Information may include (1) projected reporting, recordkeeping and other administrative costs, (2) probable effect of the regulation on affected small businesses, and (3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Paige McCleary, Adult Services Program Consultant, 7 N. 8th Street, Richmond, VA 23219; paige.mccleary@dss.virginia.gov; or 804-726-7895. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

The proposed changes to the regulation were drafted with the assistance of the AG regulation workgroup. Workgroup members included, Beverly Soble and Hobart Harvey, Virginia Health Care Association; Sandy Minton, Christina Schoendorf, Randy Scott and Wayne Chandler, representing ALF providers; Dana Parsons, Virginia Association of Nonprofit Homes for the Aging; Sharon Deboever, DSS Licensing Specialist; Natalie Hale, Eligibility Supervisor Long-term Care Medicaid, Virginia Beach DSS; Joe Schwartz, Eligibility Supervisor, Arlington DSS; Linda Eaton, APS Supervisor, Montgomery DSS; Heather Crutchfield, Adult Services Regional Specialist; Tishaun Harris-Ugworji, DSS Adult Services Program Consultant, Paige McCleary, DSS Adult Services Program Consultant; Phyl Parrish, DSS Legislation, Regulation and Policy Program Manager; and Gail Nardi, DSS Adult Services Program Manager.

A public hearing will not be held.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a	DSS would experience minimal impact when changing the requirement for ALFs to submit annual certifications instead of annual audit reports,
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<p>delineation of one-time versus on-going expenditures</p>	<p>and the agency would be responsible for notifying all facilities of the residency requirement for AG eligibility. DSS estimates spending \$120 to distribute a mass mailing to the facilities to notify them of changes to the regulation. DSS will not incur any cost notifying the 120 LDSS because this will be done through broadcast via the DSS internal website. DSS staff is responsible for updating any ongoing changes to the manual.</p> <p>The cost to distribute the mass mailing will be absorbed administratively and split 38% general fund and 62% federal funds.</p>
<p>Projected cost of the regulation on localities</p>	<p>Localities will not incur additional cost due to this regulation. LDSS will be able to ensure more accurate reviews of the application process by determining compliance with the residency requirement for AG eligibility.</p> <p>DSS will be able to improve on the distribution of payments resulting from section 22 VAC 40-25-45 h and i of the regulation because facilities will be required to notify the LDSS of an individual's discharge or date of death within 10 days and to return all AG funds received after that date.</p>
<p>Description of the individuals, businesses or other entities likely to be affected by the regulation</p>	<p>The individuals affected by this regulation include low-income adults age 60 and over and individuals age 18 to 59 who have disabilities and reside in ALFs throughout Virginia.</p> <p>Currently this regulation will impact approximately 320 assisted living facilities across the Commonwealth.</p>
<p>Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>DSS assumes approximately 320 ALFs throughout Virginia will be affected by this regulatory action.</p> <p>Of the known facilities, 41 located in the SW region may be disproportionately affected by the residency requirement portion of this regulation.</p>
<p>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</p>	<p>The affected businesses will be required to submit an annual AG certification instead of the annual audit report. The certification can be completed in less than two hours by ALF administrative staff. ALFs would not incur the cost of an annual audit, likely resulting in reduced administrative expenses to the affected businesses.</p>

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

The proposed changes to the regulation establish a less burdensome though equally effective method of ensuring accurate and proper handling of AG funds and recipients' personal needs allowances. ALF providers have requested that the regulation be reviewed and proposed changing the current requirement of an annual audit report to an annual certification.

This regulatory action offers the least burdensome means to ensure the proper management of the personal funds of individuals receiving AG and still meet the requirements of § 63.2-800.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

This regulatory action proposes a simplified though effective means by which ALFs report on the management of residents' personal funds. The proposed residency requirements ensure that AG funds will continue to be available for elderly and disabled citizens of the Commonwealth. Clarifying responsibilities associated with submitting the provider agreement, admission and discharge of residents, and maintenance of personal needs allowances in separate bank accounts will assist ALF providers in understanding their obligations. It also will simplify the regulatory language to comport with licensing regulations.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

Commenter	Comment	Agency response
Lucy Slagle	Why are these changes being promulgated for the AG program and the reason behind these changes?	This regulatory action will improve the AG Program.
Randy Scott	Supports a residency requirement	Residency requirement was included in the

	for AG eligibility	regulatory action.
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Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The proposed amendments will have a positive impact on family stability, responsibility and safety by strengthening protections for the financial well-being of AG recipients in ALFs. Simplifying and reducing the cost of complying with AG regulations will make it more attractive for ALF providers, including family operated businesses, to participate in the AG Program. Strengthening Virginia residency requirements for individuals applying for AG, will ensure the AG Program continues to benefit low-income elderly and disabled Virginia citizens in need of ALF placement. Clarifying requirements regarding the submission of the ALF provider agreement will ensure that providers are in compliance with AG regulations and safeguard the rights of individuals residing in ALFs. Incorporating person-centered language promotes the dignity of elderly and disabled individuals. These amendments will not affect parental authority or rights, marital commitment, or disposable family income.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
22 VAC 40-25-10		Provides definitions of the terms used in the regulation.	Removes the term audit report and replaces it with certification. Removes the terms newly licensed assisted living facility, other operating expense, other operating revenue, and operating costs as these terms were part of the cost report which is not longer used to determine an ALF's approved rate. Adds definition of personal toiletries. Defines AG rate as established rate as set by the Appropriation Act. Removes the terms

			applicant and recipient and replaces them with the person-centered term individual throughout the regulation. Corrects capitalization errors. Removes reference to Department of Medical Assistance Services as this agency is not referenced in other sections of the regulation.
	22 VAC 40-25-15	No current requirement.	Residency Requirement: Establishes requirement that an individual be a Virginia resident for a minimum of 90 days prior to being eligible for AG. Establishes an exception to the 90-day residency requirement if an individual moves to Virginia to be near a close relative who is a Virginia resident. Specifies that residents of Virginia apply for AG in the locality in which they reside. Clarifies that Virginia residents in an institution must apply for AG in the locality where they lived prior to entering an institution.
22 VAC 40-25-20		Describes assessment. States that providers may not collect money, gift, donation, or other consideration from or on behalf of a recipient for any services.	Adds that emergency placement may be made by a Virginia adult protective services worker before an assessment is complete. Clarifies that a provider may not accept money, gift, donation, or other consideration above the established rate from, or on the behalf of, any individual for any services.
22 VAC 40-25-30		Describes services covered by the established rate.	Clarifies the description of personal toiletries. Clarifies reference to licensing regulations.
22 VAC 40-25-40		Describes the personal needs allowance and what it covers	Clarifies that the personal needs allowances must be maintained in a separate bank account.
22 VAC 40-25-45		Describes conditions for participation in the AG Program.	Clarifies that the provider agreement must be submitted to DSS along with a copy of the ALF's license, prior to the ALF accepting any AG residents. Changes the deadline for submitting the annual certification form from June 30 to October 1. Clarifies that the established rate must be accepted as payment in full for services rendered. Clarifies the requirement that ALFs maintain personal needs allowances in a separate bank account and issue a monthly account statement. Comports with licensing regulations by clarifying whom to notify and the timeframe for notification when an individual is discharged from an ALF or dies or when an ALF closes or changes ownership. Clarifies to which LDSS an ALF should return AG payments received on behalf of a discharged or deceased individual. Corrects a reference to Adult Services Approved Provider regulations.
22 VAC 40-25-50		Describes establishment of rate. Refers to the audit report requirements.	Removes references to the audit report and the required elements of the audit report. Clarifies that the rate is set forth in the

			Appropriation Act. Adds an explanation of how the AG payment is calculated.
22 VAC 40-25-60		Describes when AG funds are to be reimbursed.	Provides guidance on returning remaining personal funds when an individual is discharged or dies.
22 VAC 40-25-70		Describes audits.	Changes the section title to Certification. Removes the description of and the information to be contained in the audit report. Describes the contents of the annual certification and timeframe for submitting to DSS. Removes reference to retroactive adjustment to the rate because rate is set by the Appropriation Act. Corrects a reference to Adult Services Approved Provider regulations.